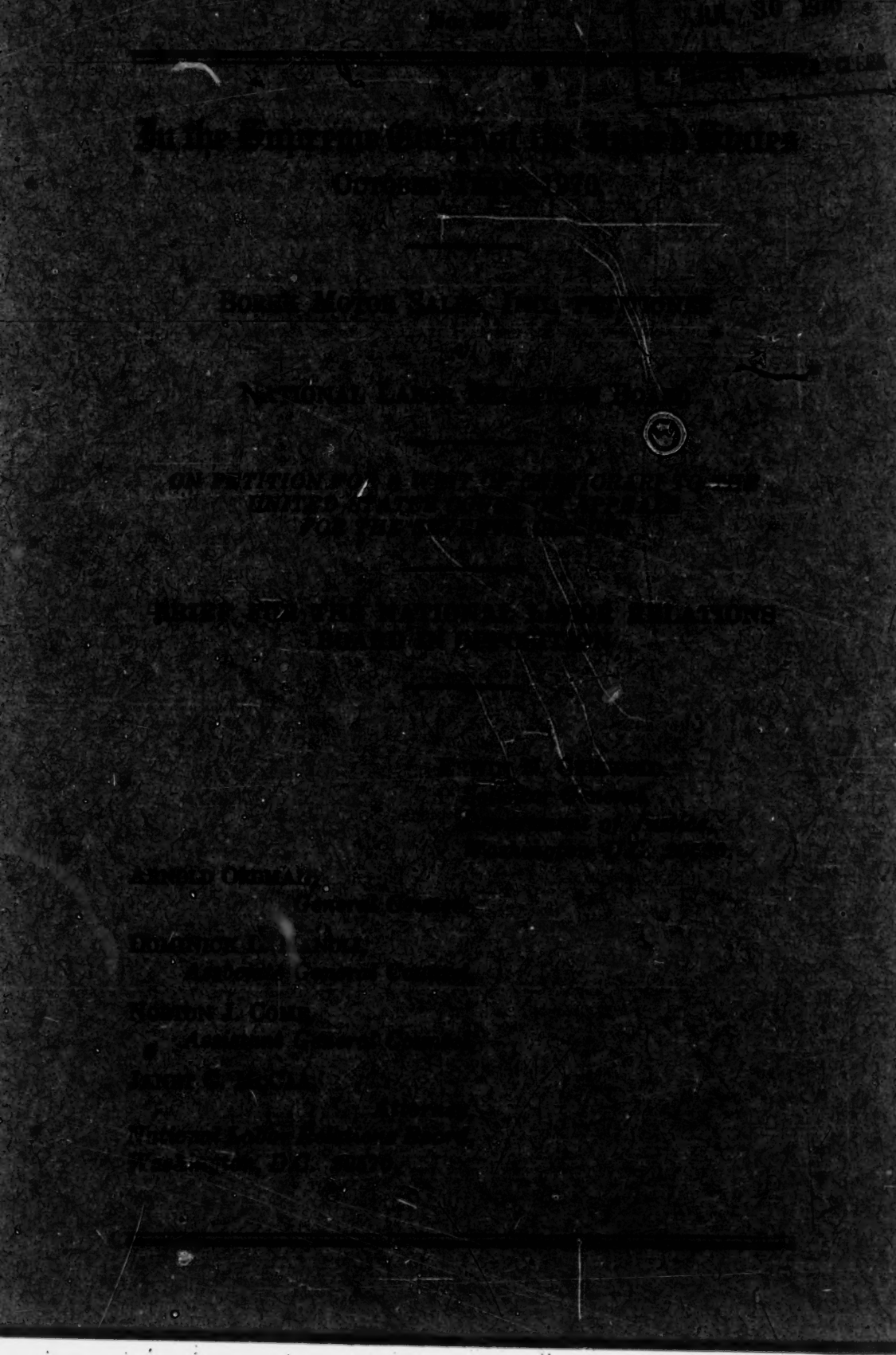


In the Supreme Court of the United States

OCTOBER TERM, 1970

No. 250

BOREK MOTOR SALES, INC., PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court of appeals (Pet. App. 37a-47a) enforcing the Board's order is reported at 425 F. 2d 677. The Board's decision and order (Pet. App. 1a-20a, 34a-36a) are reported at 173 NLRB No. 155.

JURISDICTION

The judgment of the court of appeals was entered on May 13, 1970 (Pet. App. 48a). The petition for

a writ of certiorari was filed on June 11, 1970. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

1. Whether substantial evidence supports the finding of the National Labor Relations Board that the employer discharged one of its employees because of his union activity.

2. Whether the discharge was privileged because the union, on whose behalf the employee was organizing, stated that it would seek to incorporate a "price-fixing" arrangement in any collective bargaining agreement ultimately negotiated with the employer.[1]

3. Whether the Board was required to give specific reasons for overruling each of the employer's many exceptions to the Trial Examiner's recommended decision.

STATUTES INVOLVED

The relevant provisions of the National Labor Relations Act, as amended (61 Stat. 136, 73 Stat. 519, 219 U.S.C. 151, *et seq.*), are set forth in the petition (Pet. App. 49a) and as follows:

Sec. 2. When used in this Act—

* * * *

(5) The term "labor organization" means any organization of any kind, or any agency or em-

[1] This question presents the same basic issue as that involved in a companion case, *Schmerler Ford, Inc.* v. *National Labor Relations Board*, No. 249, this Term.

ployee representation committee or plan, in which employees participate and which exists for the purpose, in whole or in part, of dealing with employers concerning grievances, labor disputes, wages, rates of pay, hours of employment, or conditions of work.

STATEMENT

In November 1967, the Union [2] delivered union literature and authorization cards to one of petitioner's salesmen, who distributed them to his fellow salesmen at the Company showroom in Blue Island, Illinois (the Company is an automobile dealer) (Pet. App. 1a-2a, 4a-6a, 34a-36a; R. 13; 88-89).[3] General Manager Farino emerged from his office, was told the men were reading "union literature," and reached for the material in Salesman Ralph Teeter's hand (Pet. App. 6a, 34a; R. 13-14; 88-89). When Teeter said, "Just a minute, I want to read it," Farino replied, "Let me know if you are thinking about signing this [union card] and I'll fire you" (Pet. App. 6a, 34a; R. 14-20, 77; 89, 103-104, 114-115).

Teeter signed a union card, and mailed it and the cards signed by the other salesmen to the Union (Pet. App. 6a-8a; R. 14-16; 90-92, 104-105, 116-117, 197). A Union meeting, held on January 7, 1968, was attended by five Company salesmen, including Teeter (Pet. App. 12a-14a; R. 20-22, 93, 106, 117-118).

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[2] American Federation of Professional Salesmen, Local 5056, unaffiliated.

[3] "R." refers to the joint appendix filed in the court below.

General Manager Farino asked one of the salesmen, the day before the meeting, when and where it was to be held. The day after the meeting, Farino was told by another salesman that there had been a meeting the previous evening "to organize a union." (Pet. App. 13a; R. 20-22; 86-87, 92-93, 150.) On the evening of January 8, Farino discharged Teeter because he "wasn't selling enough cars." Teeter protested that he was "only three cars behind the top man." (Pet. App. 14a; R. 22-24; 118-119, 159-160.)[4]

The Board, adopting the Trial Examiner's decision, found that petitioner had violated Section 8(a)(1) of the Act by threatening Teeter with discharge if he signed a union card and Section 8(a)(3) by discharging him because of his union activity (Pet. App. 12a, 16a, 34a-36a). The Board also found that the Union was a labor organization within the meaning of Section 2(5) of the Act, rejecting petitioner's argument that the Union should be denied the Board's processes because of an allegedly illegal "price-fixing" scheme it had proffered at one time (Pet. App. 35a).[5]

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[4] Although ill from about Christmas 1967 until early January 1968, Teeter was actually only two delivered cars behind the top salesman in December. Farino had been "quite pleased" with Teeter four months earlier, and, following Teeter's initial interview, he was "so excited" by Teeter's 23 years of experience as a "trained professional automobile salesman" that he "wanted to start him the next day" (R. 12-13; 81-82, 113, 155, 165).

[5] Petitioner contended that, although the Union might technically fulfill the statutory requirements of a "labor organization," the Board should not lend its processes to such an organization because it was engaged in a "bold conspiracy" to

The Board ordered petitioner to cease and desist from the unfair labor practices found, to reinstate Teeter to his former or equivalent position, to make him whole for any loss of earnings suffered as a result of the Company's unlawful action, and to post an appropriate notice (Pet. App. 18a-20a, 36a).

The court of appeals (Judge Hastings dissenting) sustained the Board's findings and enforced the Board's order (Pet. App. 37a-47a).

ARGUMENT

1. Petitioner's basic contention (Pet. 12-14) is that the Board erred in finding that the Company's discharge of employee Teeter was motivated by his

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violate Federal antitrust laws (Pet. App. 3a). In support of its contention, petitioner relied solely on discussions in a union meeting of January 28, 1968, respecting a possible pricing formula to be proposed to employers in contract negotiations (Pet. App. 3a-4a, 34a-35a). THE BOARD STATED

> Assuming arguendo, as [petitioner] maintains, that the [Union]'s proposed bargaining platform is a blueprint for an unlawful price-fixing conspiracy, any employer confronted with such a bargaining proposal would be free to reject it and could not be compelled to do otherwise. Moreover, so far as the record shows, the [Union] has not predicated its existence on its ability to obtain these allegedly unlawful price-fixing agreements from employers; it has merely indicated that it considers such agreements to be a means, albeit a preferred one, of securing employee benefits. In view of these circumstances, we can perceive no statutory justification for refusing to accord the [Union] recognition as a labor organization under Section 2(5) * * *. [Pet. App. 35a.]

union activities, rather than by his poor sales performance, as urged by the Company. Such an evidentiary issue does not warrant further review. *Universal Camera Corp.* v. *National Labor Relations Board*, 340 U.S. 474, 491.[6] In any event, the evidence summarized above amply supports the Board's finding that petitioner's asserted reason for Teeter's termination "was merely a pretext" and that the real reason for that action was his active union involvement (Pet. App. 16a, 34a).

2. Petitioner's contention (Pet. 8-9) that employee Teeter's activities on behalf of the Union were, in any event, not protected by the Act because of the Union's allegedly illegal "price-fixing" scheme presents the same basic issue as that involved in *Schmerler Ford, Inc.* v. *National Labor Relations Board*, petition for certiorari pending, No. 249, 1970 Term. We refer the Court to the Board's Brief in Opposition in *Schmerler* for a complete statement of our reasons for believing that that issue does not warrant review by this Court. See also Pet. App. 44a-45a.

3. Finally, petitioner contends (Pet. 10-12) that the Board violated Section 557(c) of the Administrative Procedure Act[7] by failing to state its reasons for

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[6] Judge Hastings' dissent likewise rests on an evidentiary issue. Thus, reading the record differently than did the Board and the court majority, he concluded that Teeter was discharged "for valid, well supported economic reasons" and that neither the Section 8(a)(1) nor 8(a)(3) violations are "supported by substantial evidence" (Pet. App. 47a).

[7] That Section provides in pertinent part (5 U.S.C. § 557(c)):

[Footnote continued on page 7]

overruling each exception pertaining to the discriminatory discharge issue. As the court below properly noted, however, the Administrative Procedure Act in terms "only requires the Board to rule on each exception, not to state the reasons therefor" (Pet. App. 43a). As the court added (*ibid*): "The Board indicated that it passed upon each exception presented by the Company. Some exceptions were discussed in the decision; the others obviously were overruled, for the Board adopted 'the findings, conclusions, and recommendations of the Trial Examiner, as modified herein.'"

The cases petitioner cites (Pet. 11) are distinguishable, since they involved situations where the Board failed fully to review its subordinate's decision or where the basis for the Board's ultimate decision was unclear. Here, the Board fully reviewed the Trial Examiner's decision and the exceptions thereto; to the extent that it overruled exceptions without specific discussion, it is clear that the Board merely adopted the findings and conclusions articulated by the Examiner.

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[7] [Continued]

The record shall show the ruling on each finding, conclusion, or exception presented. All decisions, including initial, recommended, and tentative decisions, are a part of the record and shall include a statement of—

(A) findings and conclusions, and the reasons or basis therefor, on all the material issues of fact, law, or discretion presented on the record; * * *.

CONCLUSION

The petition for a writ of certiorari should be denied.

Respectfully submitted.

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